UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

Ref. No. 357

ERROL WILLIAMS,
Complainant,

v.

LUCAS & ASSOCIATES,
Respondent.

8 U.S.C. §1324b Proceeding
Case No. 89200552

FINAL DECISION AND ORDER
(July 24, 1991)

MARVIN H. MORSE, Administrative Law Judge

Appearances:

Errol Williams, Complainant.
Reginald H. Wood, Esq. for Respondent.

I. STATUTORY AND REGULATORY BACKGROUND

This case arises under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b. Section 1324b provides that it is an "unfair immigration-related employment practice" to discriminate against any individual other than an unauthorized alien with respect to hiring, recruitment or referral for a fee, or discharge from employment because of the individual's national origin or citizenship. The statute covers a "protected individual" as defined in 1324b(a)(3) as one who is a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, an individual admitted as a refugee or granted asylum.[1]

Congress established the new cause of action out of concern that the employer sanctions program, codified at 8 U.S.C. §1324a, might lead to employment discrimination against those who appear

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[1] Section 533 of the Immigration Act of 1990 (IA 90), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) eliminated the requirement that a protected individual, who is not a citizen, file a declaration as an intending citizen in order to bring a citizenship discrimination complaint. See 56 Fed. Reg. 11272 (March 15, 1991) (retroactive effect given to charges otherwise deemed incomplete as of November 29, 1990).

"foreign," including those who, although not citizens of the United States, are lawfully present in this country. "Joint Explanatory Statement of the Committee of Conference," Conference Report, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. 87 (1986). Protected individuals alleging discriminatory treatment on the basis of national origin or citizenship must file their charges with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel or OSC). The OSC is authorized to file complaints before administrative law judges designated by the Attorney General. 8 U.S.C. §1324b(e)(2).

IRCA permits private actions in the event that OSC does not file a complaint before an administrative law judge within a 120-day period. The person making the charge may file a complaint directly before an administrative law judge within 90 days of receipt of notice from OSC that it will not prosecute the case. Section 537, IA 90, to be codified at 8 U.S.C. §1324b(d)(2).[2]

II. PROCEDURAL SUMMARY

On May 4, 1989 Errol Williams (Williams or Complainant) filed a charge alleging an unfair immigration-related employment practice against Lucas & Associates (Lucas or Respondent), an employment agency and recruiting firm. By letter dated July 21, 1989, OSC advised that it would not file a complaint on behalf of Williams because "there is no reasonable cause to believe that the charge of citizenship status discrimination is true." OSC also concluded that it lacked jurisdiction over the allegation of national origin discrimination "because it is covered by Section 703 of Title VII of the Civil Rights Act of 1969, 42 U.S.C. §2000e-2." OSC notified Williams that it had referred the national origin portion of his charge to the Equal Employment Opportunity Commission (EEOC).

February 20, 1990 Complainant filed his Complaint, which
erred to me for hearing. The Complaint alleges that
nt "knowingly and intentionally refused to consider
a application because of his citizenship and national
of 8 U.S.C. §1324b." Complainant
he applied remained open and
applications on behalf of its
ndividuals with qualifications
)lainant.

the Complaint asserting that
en dismissed by the Office of

codifies the regulation at
requires the charging party to
re an administrative law judge
f the 120-day period." That
t Errol Williams. Section 537
ges received on or after the
), 1990.

Special Counsel. . . ." That assertion was clearly unresponsive in light of 8 U.S.C. §1324b(d)(2) (private actions). On May 25, 1990 I granted Respondent an extension of time to file a responsive answer to the Complaint. On June 29, 1990 Respondent filed its Answer and a "Motion to Dismiss for Lack of Subject Matter Jurisdiction or Alternatively for Failure to State a Claim Upon Which Relief Can Be Granted." I issued an Order of Inquiry to the parties on August 20, 1990. Respondent's response was filed on September 7, 1990.

By Decision and Order dated October 22, 1990, I granted in part Respondent's motion to dismiss. I dismissed that portion of the claim relating to national origin discrimination because nothing in IRCA impinges on the EEOC's exclusive jurisdiction over national origin claims brought against an employment agency. See 8 U.S.C. §1324b(a)(2)(B); 42 U.S.C. §2000e-2(b). I also ordered Complainant to show cause as to why the citizenship portion of the Complaint should not also be dismissed, and why he failed to respond to my August 20 Order of Inquiry.

Following receipt of response from Williams, on November 28, 1990, I denied Respondent's motion to dismiss the citizenship portion of the complaint, reciting that "[t]he pleadings present a factual dispute, i.e., whether Respondent had inquired or was otherwise aware of Complainant's citizenship when it failed to refer him for a position for which it contends he was unqualified, implicating the issue as to whether he was not referred for employment because of his citizenship status." I also provided for the scheduling of a telephonic prehearing conference to schedule hearing dates.

On December 17, 1990, I received an
behalf of Williams. Both Respondent
represented by counsel at the teleph
December 19, 1990 and April 2, 1991
held, as scheduled, on Thursday,
Texas. At Complainant's request,
withdraw her appearance at the out
objection, I granted her motion.

Complainant, on May 17, 1991,
brief. On June 14, 1991 Respo
conference to request a one-week e
brief. I overruled Complainant
extension. Respondent's brief was
filed until June 26, 1991.

III. STATEMENT OF FACTS

Complainant, Errol Williams, a
resident of the United States when
January, 1989, sought employment as
two years of relevant work experi
prior to conferring certified publi
an individual. Although he had s

examinations in 1988, Williams was not yet eligible for CPA status in Texas, his state of residence, in January of 1989. Nonetheless, Williams represented to prospective employers that he was a certified public accountant, as his resume is captioned "Errol L. Williams, CPA." Exh. 1.

Williams' credentials include a degree from the College of Arts, Sciences and Technology in Jamaica and a B.S. in accounting from Southern Nazarene University in the United States. At the latter institution, Williams earned a 3.9 grade point average (GPA) in his major of accounting and a cumulative GPA of 3.7. His list of honors includes membership in the Delta Mu Delta National Honor Society as well as a place on the Dean's Honor Roll for at least six consecutive semesters.

On or about January 27, 1989, Complainant telephoned the accounting firm Touche Ross & Co. (now Deloitte & Touche) to inquire about employment possibilities. He asked to speak to a recruiter and was transferred to Katherine Hall, executive secretary to tax partner Steve Singer. Hall told Complainant to contact Randy Rowles, a recruiter employed by Lucas & Associates. She also telephoned Rowles to advise him to expect a call and asked him to see whether Williams would be qualified for any of the available positions with the tax department. Hall did not discuss Williams' qualifications with Rowles.

Williams did contact Rowles on or about January 27, 1989. Their testimony differs as to the content of this significant conversation. Williams testified that the conversation was short and that he "spoke to Mr. Randy Rowles [who] [a]lmost immediately . . . inquired into my citizenship status." Tr. 25. Williams, initially reluctant to disclose the information "because in the past it had worked against me," eventually disclosed to Rowles that he was a Jamaican citizen. Tr. 26, 27. Williams testified that Rowles went on to say "that Touche Ross would not be interested in me." Tr. 27. Williams then requested that Rowles look at his resume. According to Williams, Rowles told him to send his resume, but that "he [had] already determined that [Touche Ross] would not be interested in me." Tr. 27. Williams did mail Rowles a copy of his resume.

Rowles testified that the conversation was rather lengthy, between 20 and 30 minutes and that he followed the standard recruiting procedure, i.e., obtaining the caller's name, phone number and educational background including the schools, degrees, dates of degrees and grade point averages. Rowles does admit to having asked Complainant about his citizenship at this preliminary stage. Rowles asked Williams why he had chosen to attend the College of Arts, Sciences and Technology in Jamaica, and that Williams "didn't want to tell me based on citizenship." Tr. 113. Rowles went on to testify that "then I did ask him, since he had brought up the point of citizenship, you know, was he a U.S. citizen or did he have, you know, permission to work here in this country." Tr. 113.

Complainant's resume and testimony make clear that he was not qualified for any of the Touche Ross tax department positions for which Rowles had authority to refer. As Rowles testified, unambiguously and uncontradicted, one was a "manager level position" which required approximately five to eight years of Big-Eight tax experience for which CPA status was required. The second position called for two to three years of Big-Eight tax experience, with CPA status preferred but not required. Complainant, although working in financially related fields, had not worked in the accounting profession for at least six years prior to his conversation with Rowles. Nothing in the record suggests Williams had any experience as a tax accountant. At a minimum, Touche Ross required Big-Eight experience or an extensive tax background, both of which Williams lacked.

According to Rowles, when Williams clarified the situation, stating that he was interested in an entry-level position, Rowles informed him that he "did not work entry-level positions." Tr. 116. Rowles, however, agreed that Williams might send in his resume in case an entry-level position came to his attention.

The next contact Williams made with Rowles was in a telephone conversation a few months later when he asked for the name of the woman who referred him to Lucas. Shortly thereafter, Williams filed his discrimination charges with OSC.

IV. DISCUSSION OF APPLICABLE LAW

A. Applicable Law

Title VII of the Civil Rights Act of 196[illegible] et seq., continues to provide guidance in [illegible] the sparse section 102 precedents. See U[illegible] 1 OCAHO 74 (7/24/89), appeal docketed, [illegible] Sept. 25, 1989); see also, Adatsi v. [illegible] Bank of Georgia, 1 OCAHO 203 (7/23/90) Adatsi v. Dep't of Justice, No. 90-894[illegible] U.S. v. LASA Marketing Firms, 1 OCAHO [illegible]

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the seminal case dealing with the allocation of burden of proof in Title VII employment discrimination cases, the Supreme Court articulated a three stage procedure for proving discrimination in cases presenting indirect evidence of discriminatory behavior. LASA Marketing Firms, 1 OCAHO 141, at 12. First, the charging party must make a prima facie showing of discrimination.[3] The

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[3] To make a prima facie showing of employment discrimination, McDonnell Douglas, 411 U.S. at 802, establishes a four-part formula: (1) complainant must show that he or she belongs to a protected class; (2) that he or (Continued)

second stage shifts the burden to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802.[4] Third, the burden shifts back to the complaining party to prove by a preponderance of the evidence that the employer's explanation is a mere pretext for actual discrimination. Id. at 804. In cases of mixed motives, where both legitimate and impermissible factors enter into the employment decision-making process, the "employer shall not be liable if it can prove that, even if it had not taken [discriminatory factors] into account, it would have come to the same decision regarding a particular person." Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 1786 (1989).

In at least one circuit the prescreening of job applicants, that is, summarily rejecting potential employees prior to an inquiry into their particular qualifications only to subsequently hire another applicant for the same position, constitutes a prima facie showing of unlawful discrimination. Nanty v. Barrows Co., 660 F.2d 1327 (9th Cir. 1981). In Ostroff v. Employment Exchange, Inc., 683 F.2d 302 (9th Cir. 1982) the Ninth Circuit went further. To make a prima facie showing of employment discrimination based on impermissible grounds in prescreening cases, the job applicant/complainant need not satisfy the second part of the McDonnell Douglas four step formula for establishing a prima facie case of employment discrimination. Namely, the job applicant need not demonstrate that he or she was qualified to fill

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3 (Continued)
she applied for and was qualified for a position for which the putative employer was seeking applicants; (3) that despite being qualified, he or she was rejected; and (4) that pursuant to the rejection, the position remained open and the employer continued to seek applications from individuals having complainant's qualifications. Mesa Airlines, 1 OCAHO 74, at 41-42. A complainant must prove by a preponderance of the evidence that he or she applied for a position for which he or she was qualified, "but was rejected under circumstances which gave rise to an inference of unlawful discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (footnote omitted).

4 Respondent need not make a showing that it was actually motivated by the proffered reasons. "It is sufficient if [respondent's] evidence raises a genuine issue of fact as to whether it discriminated against the [complainant]." Burdine, 450 U.S. at 254 (footnote omitted). Respondent need only set forth a reason for complainant's rejection, and the explanation must be legally sufficient to justify a judgment for respondent. Meeting this burden, complainant's prima facie case is rebutted. Id. at 255.

the position for which applications were being sought. "When an employer summarily rejects an applicant without considering his or her qualifications, those qualifications are irrelevant. . . ." Ostroff, 683 F.2d at 304. Thus, where a complainant alleges prescreening, he or she need only show (1) membership in the protected class; (2) rejection; and (3) that subsequent to the rejection, the position remained open and the employer continued to seek applications from others.

Upon a finding of discriminatory treatment, an employer must produce evidence that the complainant would not have been hired even in the absence of discrimination. See Mesa Airlines, 1 OCAHO 74, at 44-46; Cf. Price Waterhouse, 109 S.Ct. at 1792 (preponderance of the evidence standard in mixed motive cases); with Ostroff, 683 F.2d at 304 (clear and convincing evidence standard in prescreening case); see also Davis v. City of Dallas, 748 F. Supp. 1165, 1171 (N.D. Tex. 1990) (employer has the burden of production in disparate impact case). In the event of a finding that complainant would not have been hired, full relief such as employment and lost wages, will not be awarded. See Nanty, 660 F.2d at 1333-34; Marotta v. Usery, 629 F.2d 615, 618 (9th Cir. 1980).

The Fifth Circuit, whose law is controlling in the case at bar,[5] does not adhere to the Ostroff formulation. Rather, the complainant must be qualified for the position in question in order to establish a prima facie case of employment discrimination. "[T]he failure to interview, standing alone, gives rise to no entitlement to recover." Wheeler v. City of Columbus, Mississippi, 686 F.2d 1144, 1153 (5th Cir. 1982). "Although some circuits have held that a summary refusal to consider an applicant is dispositive on the question of qualifications, the Fifth Circuit has suggested that such a refusal is only evidence that a proffered nondiscriminatory reason is pretextual." Garza v. Deaf Smith County, 604 F. Supp. 46, 52 (N.D. Tex. 1985) (citations omitted).

OCAHO caselaw governing 8 U.S.C. §1324b suggests that prescreening is impermissible. In U. S. v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90) the prospective employer required that complainant provide documentation different from that which she had already supplied, documentation which was sufficient to comply with the 8 U.S.C. §1324a(b) verification requirements. Complainant was unable to provide the particular requested documentation and was thus not offered employment. The judge held that "reckless prescreening of employees as a rationale for complying with employer sanctions imperatives violates 8 U.S.C. §1324b." Id. at 22-23. (Footnote omitted).

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5 Texas is in the geographic jurisdiction of the Fifth Circuit Court of Appeals. Complainant resides in Texas, applied in Texas for the employment at issue through Respondent's place of business in that state, and the hearing was held in Houston, Texas. See 8 U.S.C. §1324b(i)(1); 5 U.S.C. §554(b); 28 C.F.R. §68.4(b).

In LASA Marketing Firms, 1 OCAHO 141, respondent, a firm in the business of recruiting and referring for a fee for both employment and training, insisted that complainant produce documents above and beyond those statutorily required. When the complainant did not comply, the respondent did not refer her for employment. The judge found that the respondent had attempted to comply with the IRCA verification requirements. However,

> [respondent's] failure to reasonably attempt to acquire knowledge of relevant immigration-related employment documents resulted in his knowingly and intentionally discriminating, for an illegitimate reason, against [one] who, at the very least, is entitled to participate in the considerations accorded to a common membership in the aspirational promise of equal opportunity for all who 'belong,' however recently, to America.

Id. at 28 (footnote omitted) (emphasis in original). The judge held that not only was the failure to refer the applicant a violation of §1324b but "active discouragement, based solely on citizenship status . . . was a substantial impairment of [complainant's] protected right to be considered with respect to such employment, and therefore constituted an 'unfair immigration-related employment practice' within the prohibited purview of section 1324b(a)." Id.

B. How Applied

The case at bar is fundamentally distinguishable from the precedent scenarios. Marcel Watch and LASA Marketing Firms concern document verification violations which are unique to IRCA.[6] The prescreening of the type depicted in those two

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6 The prohibition against requiring prospective employees to produce more or different documentation than that statutorily prescribed was recently added to IRCA by Section 535 of IA 90, (Nov. 29, 1990), enacting 8 U.S.C. §1324b(a)(6). Title 8 U.S.C. §1324b(a)(6) provides in pertinent part:

> a person's or other entity's request, for the purposes of satisfying the requirements of Section 274A(b), for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

instances involved the culling of individuals based on their failure to provide more or different documents than are required by statute. The prescreening in the present case, however, is more in conformity with the traditional impermissible inquiries which have been the subject of Title VII litigation.

In at least the Ninth Circuit, the Title VII prohibition against unlawful prescreening of job applicants renders impermissible the consideration of or inquiry into certain characteristics of the applicant prior to the hiring or referral decision.[7] See, e.g., Nanty, 660 F.2d 1327 (9th Cir. 1981) (Black complainant summarily rejected for employment without an opportunity to file an application was told there were no jobs to be filled, but the position remained open after his rejection and two Caucasians were hired); Ostroff, 683 F.2d 302 (9th Cir. 1982) (Plaintiff was told the position was filled before inquiry was made into her qualifications, but when her husband later called to inquire about the position he was told the job was still available and was invited to apply).

The instant case conforms to the Nanty and Ostroff fact patterns; Complainant was asked about his citizenship status during the first telephone conversation prior to the consideration of his qualifications. It is undisputed that Rowles asked whether Williams was a U.S. citizen (Stipulation at 6). Complainant's and Respondent's versions of the conversation differ immaterially. Complainant testified that Respondent asked about his citizenship status "almost immediately" (Tr. 25), while Rowles, on behalf of Respondent, acknowledged that "I did ask him." Tr. 113. Such an inquiry into Williams' citizenship status is tantamount to questions relating to one's race or gender made prior to the hiring decision. Clearly, if an individual inquired into positions with an accounting firm, and the recruiter, after obtaining preliminary information, asked "Are you black?," there need be no hesitation in discerning a racially discriminatory inquiry.

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7 The prohibition against certain preemployment inquiries appears in contexts other than Title VII cases. See, e.g., Russell v. Frank, Civ. A. No. 89-2777-Z at 3. (D. Mass. May 23, 1991) (LEXIS, Genfed library, Dist file, 1991 WL 97456) (Discussing 29 C.F.R. §1613.706 (1990) implementing section 501 of the Rehabilitation Act of 1973, 29 U.S.C. §791, the court held that the regulations "draw a distinction between medical examinations given prior to an offer of employment and those given after; the examination is permissible when it follows and is a condition of the offer [of employment].") (Emphasis added).

In the Ninth Circuit, when preliminary inquiries implicate factors which should not be taken into account in employment decisions, such as race, religion or gender, a complainant establishes a prima facie case of impermissible prescreening regardless of his or her suitability for the position. Ostroff, 683 F.2d at 304. Similarly, Respondent's inquiry about Complainant's citizenship status would amount to impermissible prescreening of the type discussed in Ostroff. See also, Nanty, 660 F.2d at 1333.

I am bound, however, by Fifth Circuit caselaw. Here, in order to establish a prima facie case of discrimination, Complainant must be qualified for the position. Garza, 604 F.Supp. at 52. Even on Williams' version of the conversation with Rowles, he was patently unqualified for any position which Respondent was authorized to refer to the Touche Ross tax department. Respondent was attempting to recruit only experienced personnel for positions with the tax department, and Complainant was not qualified for them. Complainant was seeking an entry-level position but Respondent does no entry-level recruiting. As such, Complainant has failed to make a prima facie case of employment discrimination under McDonnell Douglas, which holds that the applicant be qualified for the job.

Because Complainant failed to make a prima facie showing of employment discrimination, there is no need to pursue the further prongs of the McDonnell Douglas test. Having failed to establish an initial presumption in his favor, Complainant cannot recover and is thus denied relief under IRCA.[8] Adatsi, 1 OCAHO 203, at 5. The administrative law judge must dismiss the complaint where the complainant does not establish a prima facie case. 8 U.S.C. §1324b(g)(3); 28 C.F.R. §68.50(c)(1)(iv).

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8 Even under a Ninth Circuit analysis, however, Complainant would not have recovered backpay. Where prescreening is established, "we still must determine whether, absent that discrimination, [complainant] would have been hired." Nanty, 660 F.2d at 1333. The burden of persuasion on this issue is on the employer. Respondent has successfully met the burden of demonstrating unequivocally that Complainant would not have been referred to Touche Ross. Prescreening having been established, however, other impositions against Respondent arguably would have been available under IRCA. These include but are not limited to cease-and-desist orders under 8 U.S.C. §1324b(g)(2)(A) and civil money penalties under 8 U.S.C. §1324b(g)(2)(B)(iv).

V. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER

I have considered the pleadings, testimony, evidence, memoranda, briefs, and arguments submitted by the parties. All motions and requests not previously disposed of are denied. Accordingly and in addition to the findings and conclusions already specified, I make the following determinations, findings of fact and conclusions of law.

1. That Williams is a protected individual within the meaning of 8 U.S.C. §1324b(a)(3)(B).

2. That Williams telephoned Respondent, an employment agency and recruiting firm, on or about January 27, 1989 to inquire about employment possibilities with the firm Touche Ross.

3. That Respondent through Randy Rowles made preliminary inquiries as to Complainant's citizenship status prior to obtaining Williams' qualifications.

4. That Complainant did not possess the requisite qualifications for the positions available with Touche Ross through Respondent whose recruitment authority was for experienced positions only.

5. That Complainant failed to make a prima facie or any case of unlawful employment discrimination arising out of citizenship status.

6. That this case is dismissed under 8 U.S.C. §1324b(g)(3); 28 C.F.R. §68.50(c)(1)(iv).

7. That, pursuant to 8 U.S.C. §1324b(g)(1), this [illegible] Order is the final administrative adjudication [illegible] "shall be final unless appealed" to an appropr[illegible] court of appeals in accordance with 8 U.S.C. §13[illegible]

SO ORDERED.

Dated this 24th day of July, 1991.

Mar
Adm

☆U.S. Government Printing Offi[illegible]